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Supreme Court, U.S.
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ALEXANDER L. STEVAS
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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1985

No. 84-1850

THE STATE OF TEXAS,

Petitioner

v.

RONALD CURTIS CHAMBERS,

Respondent

On Petition For A Writ of Certiorari To The
Court of Criminal Appeals
Of Texas

RESPONDENT'S BRIEF IN OPPOSITION

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U.S. Constitutional Provisions:
Fifth Amendment. 2,6,8,11,12

Sixth Amendment. 3,10,11,12

STATEMENT OF THE CASE

Respondent was convicted of capital murder and sentenced to death in a trial before a jury after a plea of Not Guilty on July 7, 1975, in the Criminal District Court No. 4 of Dallas County, Texas, Cause No F-75-4282-K. In the punishment phase of the trial, the State's only witness was Dr. James Grigson, a psychiatrist who had interviewed Applicant to determine sanity, competency, and whether continued confinement in jail, as opposed to a hospital, would impose a danger to Respondent's mental condition. He testified that Respondent had a "sociopathic personality disorder" (Vol. VIII-2392),1 "at the very end of the scale of severity; you cannot become more severe than where he falls" (2395). Grigson was permitted to give his opinion about the probability that Respondent would commit criminal acts of violence in the future constituting a continuing threat to society.

The State produced no other evidence in the punishment phase; no criminal convictions of any kind were offered; there were never any "bad reputation" witnesses nor were any questions posed to Respondent's reputation witnesses suggesting that he had any kind of police record.

Respondent offered the testimony of family friends who had known him since he was a young child, including a minister who had been the employer of his mother, but the court would not allow him to testify whether he thought Respondent would commit similar offenses in the future.

Respondent's conviction was affirmed in Chambers v. State, 568 S.W.2d 313 (Tex. Crim. App. 1978), Cert. denied, 440 U.S. 928 (1979). On direct appeal, Respondent argued that allowing Dr. Grigson to testify concerning statements made to him by Respondent was a denial of the right to

remain silent and a denial of effective assistance of counsel. Respondent also complained on direct appeal of the lack of notice to defense counsel about the psychiatric examination and the failure of Dr. Grigson to warn Respondent that his statements could be used against him.2

1/ References to the trial court transcript are identified by the designated volume number, followed by the applicable typed page number.

2/ The Petitioners' claim in their statement of the case that Respondent alleged a violation of the requirements of Estelle v. Smith for the first time in the second habeas corpus application is dead wrong. While Respondent did not denominate the objection as "Smith" error until later in the appellate process, Respondent complained of the substantive violation in the first appellate brief filed, on direct appeal to the Court of Criminal Appeals of Texas in January 1977, using the language "effective assistance of counsel," "right to remain silent," "due process of law," and "U.S. Const., Amends. 5, 6, 8 and 14." The Texas Court of Appeals found Respondent failed to preserve the error by not making a correct contemporaneous trial objection. Subsequently, the Texas Court of Criminal Appeals held as a matter of state law that no waiver may be found where defense counsel failed to make a trial objection based upon a constitutional right that had not yet been recognized at the time of trial. Ex Parte Chambers, 688 S.W. 2d 483 (Tex. Crim. App. 1984).

NO. 84-1850

IN THE

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OCTOBER TERM, 1985

THE STATE OF TEXAS, Petitioner

v.

RONALD CURTIS CHAMBERS, Respondent

ON PETITION FOR A WRIT OF CERTIORARI

TO THE

COURT OF CRIMINAL APPEALS OF TEXAS

RESPONDENT'S BRIEF IN OPPOSITION

The respondent, RONALD CURTIS CHAMBERS, respectfully requests that this Court deny the Petition For Writ of Certiorari seeking review of the opinion of the Court of Criminal Appeals of Texas, delivered December 5, 1984, reported at 688 S.W.2d 483 (Tex. Crim. App. 1984).

REASONS FOR DENIAL OF WRIT

I.

The Dallas prosecutors' retroactivity argument presents no colorable issue warranting certiorari, for at least four separate reasons:

A. The decision of the Texas Court of Criminal Appeals is fully consistent with well-reasoned decisions of the United States Court of Appeals for the Fifth Circuit

holding Estelle v. Smith, 451 U.S. 454 (1981), retroactive. The leading Fifth Circuit opinion, Battie v. Estelle 655 F.2d 692, (5th Cir. 1981), remains as unimpeachable today under Solem v. Stumes, 465 U.S. _____, 104 S.Ct. 1338, 79 L.Ed. 2d 579 (1984), as under prior decisions of this Court.

Although the Texas courts had repeatedly ignored the Miranda v. Arizona, 384 U.S. 436 (1966),implications of prosecutors' tactics involving Doctors Grigson and Holbrook prior to 1981, the unconstitutionality of these tactics was never seriously in doubt by the federal judiciary. Smith, the first Texas capital case presenting the issue to reach a federal court, sailed through the federal system without a single judge or Justice voting for the State's position. Habeas corpus relief was granted by the district court, 445 F. Supp. 647 (N.D. Tex. 1977); a unanimous panel of the Fifth Circuit affirmed, 602 F.2d 694 (5th Cir. 1979); rehearing en banc was denied without any request for a poll, let alone any dissent, 606 F.2d 321 (5th Cir. 1979); and this Court unanimously affirmed, 451 U.S. 454 (1981).

Petitioner mistakenly places heavy reliance on Solem v.Stumes, supra, for its holding that the principal announced in Edwards v. Arizona, 451 U.S. 477 (1981), would not be applied retroactively. Neither Respondent nor the Petitioner has ever argued that the Edwards rule had any bearing on Respondent's case; Respondent never envoked his right to counsel during Dr. Grigson's psychiatric examination, because Grigson never advised Respondent that he had such a right, or that he had the constitutional right to remain silent. Thus, the petitioner's reliance is misplaced.

B. To be sure, only six Justices were willing to decide Smith on Fifth Amendment grounds; Justices Stewart, Powell, and Rehnquist did not wish to reach that question.

But the Court was unanimous on the Sixth Amendment basis for its decision, with all three opinions stating that the result was a simple and obvious application of Massiah v. United States, 377 U.S. 201 (1964). See Estelle v. Smith, supra, 451 U.S. at 469-471; id. at 474 (concurring opinion of Justice Stewart, joined by Justice Powell); id. at 474-75 (concurring opinion of Justice Rehnquist). For such a decision to be declared non-retroactive is inconceivable.

The District Attorney's contention that Smith was not "'clearly' or 'distinctly' foreshadowed" by prior law within the meaning of Solem v. Stumes, supra, 79 L.Ed. 2d at 591, misconceives both decisions. In Stumes the holding of Edwards v. Arizona, supra, was held to have "establish[ed] a new rule" (79 L.Ed. 2d at 589), not clearly foreseeable, because it innovated a "per se approach" (ibid) after this Court "had several times refused to adopt per se rules governing the waiver of Miranda rights" (id. at 590). The Court's Sixth Amendment decision in Smith involved no similar innovation departing from a course of previous precedent. It simply applied Massiah, according to Massiah's plain language and unmistakable purport, in a factual setting where the application of the Massiah rule was clear. After Hoffa v. United States, 385 U.S. 293 (1966), and Kirby v. Illinois, 406 U.S. 682 (1972), it was hornbook law that the fact of indictment alone triggered a criminal defendant's Sixth Amendment right to counsel in any confrontation with state-instigated agents. Massiah himself had been confronted not with a police interrogator but with an undercover agent; Massiah was not in custody at the time of the confrontation, but at large on bail. The application of Massiah to an indicted defendant questioned in custody by a state-appointed psychiatrist is simply a fortiori. To claim that it was not clearly and distinctly foreshadowed by

Massiah is disingenuous.[1]

C. The Texas Attorney General's office, which did not seek certiorari in Battie, recently advanced in the Fifth Circuit a non-retroactivity argument identical to the one made by the Dallas prosecutor in this case. The Court of Appeals, finding the claim ludicrous, rejected it one day after oral argument:

> While Estelle v. Smith may have been a new and clear break with the past in the view of Texas courts, we do not think the Supreme Court so regarded it . The Court saw the psychiatric testimony on future dangerousness, without prior warning or advice of counsel, as violating clearly established constitutional law. It was a unanimous judgment, three [opinions] of the Justices saying that the 1964 case of Massiah v. United States, 377 U.S. 201, 84 S.Ct. 1199, 12 L.Ed. 2d 246 (1964), decided the matter. Smith [did not] . . . establish [ ] a new principal of constitutional law.

Muniz v. Procunier, 760 F.2d 588, 590 (5th Cir. 1985).

D. Finally, it is important to note that rejection of the Dallas prosecutor's retroactivity argument will have no significant "disruptive effect on the administration of Justice" in Texas, Solem v. Stumes, supra, 79 L.Ed. 2d at 591. In the nearly four years since Smith was decided and held retroactive in Battie, virtually every Texas death row inmate with a Smith claim has already been granted relief. According to the records of the NAACP Legal Defense Fund, at least nineteen have had the death sentences vacated by state or federal courts on the basis of Smith, and at least seven more have had their sentences commuted by the Governor at

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1/ The fact that the Texas Court of Criminal Appeals blindly refused to obey this basic principal of constitutional law for many years with respect to the activity of Dr. John Holbrook and James P. Grigson, e.g., Gholson v. State 542 S.W.2d 395, 400, Tex. Crim. App. 1976, hardly triggers retroactivity analysis.

the prosecutions' request in advance of court decisions. (See Appendix A, infra.)2

Only one Smith case is pending in the Fifth Circuit (Jones v. Procunier, No. 84-1401) and two more are in the federal district court for the Eastern District of Texas, plus Muniz v. Procunier, supra. Just about every death sentence that could be vacated under Smith has been vacated already. If the State has any information to the contrary, it has not said so: in neither this case nor Muniz have the prosecutors identified from their records a single pending case which would be affected by declaring Smith non-retroactive at this late date. The impact of denying certiorari is virtually nil.

II.

The Dallas prosecutors' assertion that the evidence showed counsel was notified and Respondent warned about Dr. Grigson is shamelessly misleading, and certiorari would turn into an argument on the facts.

A. The decision of the Texas Court of Criminal Appeals is a consistent application of this Court's ruling in Estelle v. Smith as evidenced by the testimony of Doctor

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2/ The Governor of Texas commuted over thirty death sentences in the wake of Smith and Adams v. Texas, 448 U.S. 38 (1980). It is quite possible that more than seven involved Smith issues. The Legal Defense Fund's list is conservatively limited to cases in which opinions or court papers on file at the Fund conclusively establish the presence of a Smith claim.

There may be other Texas death cases in which psychiatrists testified for the prosecution at the penalty phase hypothetically (i.e., without examining the defendant), or at the guilt stage of the trial in response to an insanity defense, or at a competency trial in response to a claim of incompetence, or for some other purpose. These cases, of course, are not covered by Smith and are unaffected by the claim advanced in the certiorari petition. See Barefoot v. Estelle, 463 U.S. _____, 77 L.Ed 2d 1090 (1983): Estelle v. Smith, supra, 451 U.S. at 465-66 & n. 10.

Grigson and defense counsel developed at an evidentiary hearing specifically designed to explore the issue. In particular, the Texas Court of Criminal Appeals found "[t]he testimony of Dr. Grigson at the hearing in the trial court is uncontradicted: petitioner was not advised that he had a constitutional right not to answer the questions put to him by Dr. Grigson." Ex Parte Chambers, 688 S.W. 2d 483 at 485 (Tex. Crim. App. 1984).

Petitioner argues that the Fifth Amendment requirements were met by defense counsel. In effect, they urge that remarks which defense counsel may have made to Respondent satisfy Smith, Miranda, and the Fifth Amendment.

None of defense counsel's remarks provided Respondent with adequate warning of his constitutional rights; the record documents the vagueness and ambiguity of their statements.3

Halsey stressed that his remarks regarding a psychiatrist were grouped together with references to cell mates, visitors and police, and he discussed a psychiatrist "in not great detail but some detail" (E.H. 59-60). Hudson admitted that his "instructions and explanations" were no more specific (E.H.50); he only told Respondent not to speak with anyone but his attorneys about the case (E.H.41). He never warned Respondent not to talk with Grigson or the consequences. Hudson specifically testified that he did not give his warnings several times; he gave Respondent this general warning just once,at a time he thought Respondent understood (E.H. 43).

3/ References to the evidentiary hearing's Statement of Facts are identified as "E.H." followed by the applicable page number. The evidentiary hearing was held before the Honorable John Mead on May 21, 1984.

Defense counsel Halsey's testimony was ambiguous in his claim that he warned Respondent. His conversation was vague, casual and ineffective in providing Respondent with the "guiding hand" that Smith requires. In Respondent's case, Halsey at best could only recall a "conversation that was more than one sentence long" (E.H. 61); yet he said he would normally warn his clients in capital cases "several times" not to talk with a psychiatrist (E.H. 62).

In Respondent's case, Halsey admitted he did not even remember mentioning Grigson's name (E.H.61); yet he claimed that he normally gave his clients the names and physical descriptions of potential psychiatrists (E.H. 63). Halsey was "almost sure" he told Respondent that anything he told a psychiatrist could be used against him (E.H. 58), but he said this in the same context as other general warnings (E.H. 59), he did not go into it in great detail (E.H. 60), it was merely "more than one sentence long" (E.H. 61), he "possibly" tied it in to special issues facing Respondent at the penalty phase (E.H. 62), and he did not recall the details of his conversation with Respondent on this point (E.H. 72). He wrote no letter to Respondent detailing the hazards of talking to a psychiatrist (E.H. 71-72).

Halsey's notes did not reflect that he discussed the hazards, or even the dates of his visits (E.H. 74). Halsey could not recall exactly when he made these comments to Respondent. It could have been one of his first visits, early in the representation or within a few days of the examination by Grigson. These general remarks could have been given up to two months prior to Grigson's examination. Clearly, Respondent received some warning concerning a

potential interview with a court-appointed psychiatrist. It is equally obvious that the warning he received was not qualitatively the type which could substitute for Miranda warnings or other procedural safeguards employed to protect an individual's privilege against self-incrimination. Thus, the Dallas prosecutor's claim that Respondent received adequate warning of his Fifth Amendment rights is meritless.

Based upon a record containing these facts, the Texas Court of Criminal Appeals correctly concluded that such consultation with counsel at some indefinite time prior to the interview with Dr. Grigson did not satisfy the requirements of Estelle v. Smith. Their decision is a straightforward application of Smith principles to Respondent's case.

B. Furthermore, the concurring opinion, which is joined by a majority of the Court, illustrates that defense counsel had no advance notice that the examination would encompass the issue of Respondent's future dangerousness:

> The record is . . . undisputed that Dr. Grigson evaluated the applicant on the very same day that the trial judge ordered him appointed and that applicant's lawyers were not given advance notice that Dr. Grigson would evaluate their client; nor were counsel given the opportunity to consult and advise applicant regarding Dr. Grigson's appointment and evaluation. Finally, applicant carried his burden in showing that counsel was unaware that Dr. Grigson's appointment and evaluation would encompass the issue of petitioner's "future dangerousness."

Ex Parte Chambers, supra at 485.

Obviously, these factual findings of the Texas Court of Criminal Appeals based upon the evidentiary hearing record discredit the Dallas prosecutor's disingenuous us observation that "[p]rior to the examination, defense counsel and Respondent were informed by the trial court that Dr. James Grigson would be appointed to examine the defendant" (Petitioner's Writ p. 10).

The State's Motion For Psychiatric Examination was

filed and Grigson appointed without a chance for defense counsel to respond. Grigson did not discuss the examination with defense counsel (E.H. 14). The only notice to defense counsel was a copy of the motion mailed to Hudson (E.H. 15). Dr. Grigson proceeded the same day to examine Respondent, rendering the mailed notice useless. Halsey recalled that no one warned, alerted or notified him in advance that any psychiatrist was going to examine Respondent for any purpose; he recalled no receipt of copies of the State's Motion and Order (E.H. 53,54, 66, 73). In fact, he was not even named on the Certificate of Service (E.H. 15, 135).

J.A. Snow, the trial court's coordinator, testified he contacted Grigson at jail to tell him of his appointment, and Grigson told Snow that he would proceed immediately to examine Respondent (E.H. 127). Snow said that he left a message with Hudson's office regarding his conversation with Grigson (E.H. 128). Snow claimed he contacted Halsey and told him that Grigson was proceeding immediately to examine Respondent (E.H. 128). Snow admitted that up to 30 minutes had elapsed between his conversation with Grigson and Halsey, and he knew of no other notice to defense counsel from any other source regarding Grigson's interview (E.H. 129). Snow's attempted "notice" to Counsel, such as it was, came too late. This Court has never held that the Smith requirements are met when a court coordinator telephones defense counsel that a psychiatrist had been appointed and was proceeding to interview the accused forthwith.

It is undisputed that the scope of the State's motion and the Court's order was for the limited, neutral purpose of determining sanity, competency and whether continued confinement in jail, as opposed to a medical facility, would pose a danger to Respondent's medical condition. Neither the motion nor order even arguably refers to future

dangerousness. (E.H. 135-36). Thus, defense counsel also had no notice of the true purpose: that the interview would range well beyond the court order. The State's failure to give notice either that Grigson's examination would encompass future dangerousness or to what end Grigson's findings could be used, clearly violated the requirements of Smith, supra. Even if this Court finds that Hudson and Halsey are deemed to have received notice of the examination, there is absolutely no evidence that they received notice that it would encompass future dangerousness. Furthermore, even assuming Snow contacted defense counsel by telephone on June 27, 1975, (E.H. 38-39, 53-54), the order for a psychiatric examination about which he was calling them was silent about future dangerousness.

In Smith, supra, this Court held, unanimously and unequivocally, that when Smith's counsel were not notified in advance that Grigson's examination would encompass the issue of future dangerousness, his Sixth Amendment rights were violated. Smith, supra, 451 U.S. at 471. The Texas Court of Criminal Appeals correctly recognized that the same is true in Respondent's case.

Respondent had a constitutional right to the guiding hand of his counsel, when faced with an impending examination, to weigh other available evidence, Grigson's biases and predelections, and possible alternative strategies. Smith, supra, citing Smith v. Estelle, 602 F.2d 694, 708 (5th Cir. 1979), and see Powell v. Alabama, 287 U.S. 45 (1932). "[O]nly after sufficient notice is given and received by counsel" can counsel "then be able to give his client 'the guiding hand of counsel.'" Mays v. State, 653 S.W.2d 30, 35 (Tex. Crim. App. 1983) (emphasis added). The Sixth Amendment was meant to provide Respondent with a constitutional guarantee that he need not stand alone

against the State at this critical stage, yet that is exactly what happened. Hudson and Halsey were likewise entitled to be made aware of Grigson's activities involving Respondent and to advise and prepare him accordingly. Smith, 451 U.S. at 475 (Rehnquist, J., concurring). The right to assistance of counsel is "one of the safeguards of the Sixth Amendment deemed necessary to insure fundamental human rights of life and liberty." Johnson v. Zerbst, 304 U.S. 458, 462 (1938).

Respondent's Sixth Amendment right to assistance of counsel was abridged when he was "not given prior opportunity to consult" with Hudson and Halsey "about his participation in the psychiatric examination." Smith, 451 U.S. at 470, n. 14 (emphasis added). Respondent had a right to be assisted by counsel in deciding whether to submit to the specific examination. Gholson v. Estelle, 675 F.2d 734 (5th Cir. 1982).

The Texas Court of Criminal Appeals correctly applied the established principles of this Court's decision in Estelle v. Smith, supra, to an almost identical fact pattern in Respondent's case. Respondent's case adds nothing unusual or unique to the pre-existing analysis. The record contains extensive testimony on the issues of warnings concerning self-incrimination, notice of the psychiatric examination, and notice of the scope and purpose of the examination by Dr. Grigson. An independent reading of the entire record compels the conclusion that the requirements of Smith, supra, were not met in that Dr. Grigson did not give Respondent his constitutionally required warnings, and that the safeguards of the Fifth Amendment were not afforded him. In light of the testimony contained in the record, no further review of these issues is warranted.

CONCLUSION

In conclusion, the Petition For Writ of Certiorari should be denied because the Texas Court of Criminal Appeals' decision below is consistent with this Court's applicable decisions. The Texas Court of Criminal Appeals' recognition that Respondent's Fifth and Sixth Amendment rights were violated does not conflict with decisions of this Court, particularly Estelle v. Smith, 451 U.S. 454 (1981). This court should not undertake a review of the facts on writ of certiorari because the ruling of the Texas Court of Criminal Appeals is not erroneous. The Petition For Writ of Certiorari should be denied for this reason alone.

Furthermore, the Texas Court of Criminal Appeals' decision extending retroactive effect to this Court's decision in Smith, supra, accords with the body of law concerning determination of retroactivity announced by this Court. The principles of Smith, supra, were clearly or distinctly foreshadowed by this Court's decision in Massiah v. United States, 377 U.S.201 (1964). As such, Smith should be applied retroactively to Respondent's case. For this reason alone the Writ should be denied.

WHEREFORE, Respondent respectfully requests that this Court deny the Petition for Writ of Certiorari, seeking review of the opinion of the Texas court of Criminal Appeals in this case.

Respectfully submitted,

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APPENDIX A

Texas Capital Cases Known to the NAACP Legal Defense and Educational Fund, Inc. Involving Estelle v. Smith Issues

I. Fifth Circuit Cases

1. White v. Estelle, 720 F.2d 415 (5th Cir. 1983)
2. Green v. Estelle, 706 F.2d 148 (5th Cir. 1983)
3. Gholson v. Estelle, 675 F.2d 734 (5th Cir. 1982)
4. Ross v. Estelle, 675 F.2d 734 (5th Cir. 1982)
5. Battie v. Estelle, 655 F.2d 692 (5th Cir. 1981)

II. District Court Cases

1. Bell v. Estelle, C.A. No. B-81-909 (E.D. Tex. Jan. 17, 1984)
2. Shippy v. Estelle, C.A. No. W-81-CA-081 (W.D. Tex. Oct. 24, 1983)
3. Von Byrd v. Estelle, No. B-79-760-CA (E.D. Tex. June 9, 1983)
4. Livingston v. Estelle, No. S-77-75-CA (E.D. Tex. Jan. 6, 1983)
5. Collins v. Estelle, C.A. No. W-78-CA-91 (W.D. Tex. Sept. 13, 1982)
6. Denney v. Estelle, C.A. No. B-80-161 (S.D. Tex. Feb. 4, 1982)
7. Ferguson v. Estelle, No. W-80-CA-50 (W.D. Tex. Jan. 12, 1982)

III. Texas Court of Criminal Appeals Cases

1. Mays v. State, 653 S.W.2d 30 (1983)
2. Ex Parte English, 642 S.W.2d 487 (1982)
3. Ex Parte Demouchette, 633 S.W.2d 879 (1982)
4. Fields v. State, 627 S.W.2d 714 (1982)

5. Clark v. State, 627 S.W.2d 693 (1981)

6. Brandon v. STate, No. 59,348 (June 2, 1982)

7. Thompson v. State, 621 S.W.2d 624 (1981)

Commutations by the Governor prior to court decision in cases known to contain Smith issues

1. Jackie Osteen (June 17, 1981)

2. James Simmons (Aug. 17, 1981)

3. Magdaleno Rodriguez (Oct. 16, 1981)

4. William Hammett (Oct. 21, 1981)

5. Artie Armour (Oct. 21, 1981)

6. Doyle Boulware (Oct. 20, 1982)

7. Moses Garcia (March 22, 1983)